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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK WATTS,
Petitioner,

vs.

CIVIL SERVICE BOARD FOR
THE CITY OF COLUMBIA, TENNESSEE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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ISSUES PRESENTED FOR REVIEW

I. May a Chief of Police and a City Manager order a Policeman not to appear before a Grand Jury to testify against the Mayor's friend and business associate?

II. Does the Chief of Police and the City Manager have a right to fire that Policeman who had a "heated discussion" with the Attorney General concerning his right to appear before Grand Jury?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE STATE OF TENNESSEE

Petitioner, FRANK WATTS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Tennessee entered on September 8, 1980 and its judgment denying a petition for a rehearing entered October 20, 1980.

OPINIONS BELOW

These opinions are included in the Appendices, as Appendix A and Appendix B, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257.

CONSTITUTIONAL QUESTIONS INVOLVED

The First Amendment provides:

> "Religious and political freedom.—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".

The Fourteenth Amendment provides:

> "Citizenship—Due Process of Law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE

Petitioner, Frank Watts, was a policeman for the City of Columbia, Tennessee. The City of Columbia operated under a Civil Service System and maintained a Board pursuant thereto. This Board is the Defendant.

On April 25, 1977, Petitioner was suspended indefinitely by the City Manager for "disobeying a written directive of the Chief of Police", and "conduct unbecoming an officer".

Petitioner requested a hearing before the Civil Service Board which was granted. At the hearing it was developed that the written directive he was accused of violating was that petitioner should not proceed with any evidence to the next grand jury or any other court.... The letter appears in the appendices, as Appendix C, page A-24.

The charge of "conduct unbecoming an officer" stemmed from petitioner's going to the Attorney General and having a "heated discussion" with him as to why he could not go before the Grand Jury.

Petitioner learned from the F.B.I. that one Ernie Anglin who was a friend and business partner of the Mayor of Columbia had a stolen gun in his possession. After further investigation and on June 4, 1976 he appeared before the Grand Jury and gave evidence. The Grand Jury indicted the Mayor's friend, Anglin, on a charge of concealing stolen property. The evidence was that the gun was in Anglin's possession, that he knew it was stolen and that Anglin sold it.[1]

The case against Anglin came on for trial on January 17, 1977. The Assistant Attorney General announced to the Court that there was a defect in the indictment in that it failed to state that the gun had a value of more than $100.00. He called it "a typographical error". Judge Sam Lewis entered a nolle prosiqui and ordered the case be sent back to the Grand Jury for correction of the error.

On February 21 1977, before the next Grand Jury convened, Petitioner received the letter, above referred to, from the Chief of Police, and approved by the City Manager stating inter alia:

> "This is to advise you that you shall not proceed with any evidence to the next Grand Jury or any other court, news media, or any other persons concerning this case unless you have prior clearance from me or the City Manager".

Upon receipt of this letter, the petitioner found Judge Jerry Scott, one of the three judges of the 11th Judicial Circuit and showed him the letter and ask for his advice. Judge Scott

---

[1] This was one of many guns in a collection stolen from the home of a Nashville lawyer.

testitifed at the Civil Service Hearing that when he read the letter he was "amazed"; he did not believe that the Chief and the City Manager whom he regarded very highly would put this in black and white, and that it was a real shock. He also testified:

> "that nobody, nobody can keep you from going before the Grand Jury. There is not a soul on the face of this earth, including me, as a Judge, who impanels Grand Jurys that can keep anybody from going before the Grand Jury. That is a right found in the 1st Amendment of the U.S. Constitution, and it is carried into the Tennessee Constitution, so nobody can keep you from going before the Grand Jury, and I told him that. Judge Lewis was very concerned about it and wanted to see Officer Watts the following morning, and so I relayed to Officer Watts that Judge Lewis had told me on the phone that he wanted to meet with Officer Watts at 8:30 the following morning, and I presume that he did".

He then said that he told Officer Watts not to pay any attention to the letter in so far as the Grand Jury was concerned.

> He then testified: "When I told Officer Watts not to pay any attention to this letter, in so far as the Grand Jury was concerned, I did not know all the facts, but if anybody knows any facts about an indictable offense occurring in Maury County, they have an absolute right to go before the Grand Jury, and I don't care what these city managers say, I don't care what the Chief of Police says, I don't care what this Board says, any citizen has the right to go before the Grand Jury of this County, if they know about any crime being committed in this county".
>
> "How they conduct an investigation, Mr. Fleming, is up to them. My concern is about the purity of the Grand Jury system and it was obvious that this man had been to the Grand Jury before. He told me that he had been to the Grand Jury and got an indictment against this gentleman,

> and that because of a defect in the indictment, the case had been nolled by Judge Lewis with the direction from Judge Lewis that it go back to the Grand Jury. Now with that in mind, I am telling you that I don't care how many superiors he has in the Police Department, Judge Lewis told him to go back to the Grand Jury and that, as far as I am concerned, that it an order of the Circuit Court and he is suppose to go to the Grand Jury".

At the appointed time, and at Judge Scott's direction, the petitioner met with Judge Lewis, in Judge Lewis' office in Pulaski. Judge Lewis was the circuit judge, who had heard the original Anglin case when it was nolled because of the defect in the indictment. Judge Lewis testified that while he did not give the petitioner any advice that morning, he did tell him that a man, no matter what his job, had a duty and an obligation to appear before the Grand Jury. That the Grand Jury system is the greatest in the world, and that any citizen has the right and the obligation to go before the Grand Jury and to present evidence of a crime if he thinks a crime has been committed. When asked by Counsel representing the Respondent, if it was not a matter of practice throughout the State of Tennessee, that one of the duties of the Attorney General was to determine, based on investigation and reports that he received from policemen, whether the case should merit presentation to the Grand Jury, Judge Lewis responded:

> "Mr. Fleming that is an erroneous thing that has grown up in this state, and I hope to God that it is corrected one of these days. The Attorney General has a right—we have two methods to go before the Grand Jury, one is by indictment that is the Attorney General is suppose to prepare an indictment setting forth charges with the names of witnesses on it, present it to the Grand Jury and then subpoena those witnesses. The other is by presentment, any citizen, any citizen of this state, or any citizen of the United States has the right to go before the Grand Jury of Maury County

> and present evidence if he feels that a crime has been committed. If we ever stop to let me, as a Circuit Judge, or General Gay, as the Attorney General or any Attorney General in the state, or any Judge to say that we are going to stop a man from going before the Grand Jury then we don't need the Grand Jury, and if we ever do away with the Grand Jury then we are headed fast down to a dictatorship. That is the one thing in this country that keeps it from being that way, and I hope and pray that that doesn't happen. The Attorney General has a role, and his role is to advise with them, but I tell Grand Jurys when they are impaneled that they are an independent body, that they operate independent of the Attorney General, and independent of me, the Circuit Judge, and they are the only ones and that is their role".

He testified that if a person were denied the right to go before the Grand Jury that would be an unlawful order.

Thereupon, petitioner, after these two conferences, wrote a letter to the City Manager, dated March 9, 1977, requesting permission to go before the Grand Jury, with the same evidence. Appendix D, page A-26, He received a letter and response thereto denying him that right. Appendix E, page A-27.

On March 10, 1977, he attempted to go back before the Grand Jury. He was told to come back Monday. When he arrived on Monday another Assistant General, Jim Hamilton, and Frank Duncan, a lieutenant in the Columbia Police Department were there. He went before the Grand Jury and was asked by the foreman if he had checked with his superiors. It is interesting to note at this point, how the Grand Jury knew that an order had been given for him to check with his superiors before he went before the Grand Jury.

The Grand Jury did not reindict Anglin.

Thereupon, he went to see the Attorney General to find out why he could not go before the Grand Jury and was told by the Attorney General, that he, the Attorney General, did not have to explain why. This conference was loud and both parties raised their voices, "like a lawyer fussing over a case". There were no curse words, nor abusive language used. This was confirmed by the Attorney General.

By letter of April 25, 1977, petitioner was suspended indefinitely, Appendix F, page A-29.

The Commerce Union Bank of Columbia had loaned Ernie Anglin money with the Mayor as co-maker. The Mayor and Ernie Anglin had built homes together, and also Mr. Anglin had worked in the construction business for the Mayor.

Witnesses testified that after Ernie Agnlin's arrest, he came to the jail and made a statement that "I've done got one man down here fired, and I am going to call the Mayor and see if I can't get some more fired". On advice of Counsel Anglin did not testify at the hearing.

The result of that hearing was that three of the five members voted to fire petitioner, and two voted to retain him.

Under the statutory laws of the State of Tennessee, and the private act creating the Civil Service Board for the City of Columbia, in order for a review to be accomplished, certiorari must issue to the Administrative Agency. A Petition for Certiorari was seasonably filed and the case came on in due course to be heard upon the record before the Civil Service Board, with the third circuit judge hearing the matter. The other two judges, of course, had testified at the hearing and their testimony was on behalf of the petitioner. The circuit court sustained the Civil Service Board, and an appeal was prayed and granted to the Court of Appeals, which sustained the circuit judge. The Petition for Certiorari was filed with the Supreme Court of the State of Tennessee, resulting in three members of the Court voting to sustain and affirm, and two members dissenting in a strong dissent.

This case was argued before a Supreme Court consisting of four of the five regular justices; namely, Cooper,J., Harbison,J., Brock,C.J., Fones, J., and Special Judge Brooks McLemore, who took the place of a member who was ineligible to sit in this particular case, being of kin to counsel. It is interesting to note that Special Judge McLemore was a former Attorney General, and he was the author of the majority opinion.

REASONS FOR GRANTING THE WRIT

A policeman and or a citizen has every right and duty to appear before a Grand Jury when a violation of the law is known to him.

The 5th Circuit in the case of *Van Ootegham* v. *Gray,* 628 F. 2d 488 (5th Circuit 1980), was a case in which the plaintiff was an Assistant County Treasurer who after telling his supervisor of his intention to address the commissioners court on the subject of civil rights for homosexuals was sent a letter restricting him to his office during the hours 8:00 a.m. to 12:00 noon, and 1:00 p.m. to 5:00 pm. (when the commissioners court was in session). The plaintiff was fired for insubordination when he failed to sign this letter as instructed. The court held that the plaintiff's speech did not significantly interfere with the operation of the treasury nor did it impede the plaintiff's performance of his daily functions. According to the Court "the compelling state interest" standard would be satisfied only upon proof that the regulation of speech was necessary to prevent a "material and substantial interference" with the operation of the public department. While the speech at issue may have been distressing to some fellow employees and supervisors, public speech on civil rights is at the core of the free speech clause of the First Amendment. Thus, the court held that there was no substantial and material intereference as a matter of law.

A number of courts have held that the interest of society in encouraging its public employees to speak out and report violations of the law far outweighs the interests of the employer in avoiding embarrassment. Thus, in *Hickingbottom* v. *Easley,* 494 F.Supp. 980 (E.D. Ark. 1980), the court held in favor of an instructor at a community college who was non-renewed by the college after he made a complaint to the state authorities that certain school officials, including the president were involved in allegedly illegal practices. The school claimed, as in the instant case, that plaintiff was discharged not for the content of his

speech, but for his failure to follow the schools "line authority policy", which required that the faculty follow a certain chain of command before writing any letters concerning college problems. The Court held that the plaintiff had acted properly in reporting the violations to the proper state authorities, and quoted from *In Re Quarles, and Butler, Petitioners,* 158 U.S. 532, 535 (1895), said that it was the duty of everyone to assist in the detection of crime and he knows facts that tend to show that a crime has been committed, it is not only proper, but it is his duty to communicate them to the proper officer.

In *Atcherson* v. *Siebenmann,* 605 F. 2d 1058 (8th Cir. 1979), the court again considered a defendant's contention that plaintiff's exposure of alleged wrongdoing was in violation of a directive requiring that all such correspondence be channeled through a particular officer. The plaintiff, a county juvenile probation officer, had sent a letter to the Assistant County Attorney regarding alleged improper expense reimbursements by other probation officers. The Judge of Juvenile Court obtained the letter, told plaintiff that her conduct had substantially harmed the working relationships in the office and forced her resignation.

The court held first that while plaintiff's accusations would naturally tend to disrupt the working relationships in the office, a) they would not have greatly increased the disharmony that was already present, and b) because of the independent nature of their work, the officers could continue to operate satisfactorily despite any disharmony. 605 F. 2d at 1063. More importantly, said the Court, plaintiff's allegations of misappropriation of public funds represented a matter of "compelling public concern" for which she should not be punished:

> Apart from the other members of the probation office staff, Atcherson may have been the only person aware of the evidence that her co-employees padded their mileage claims. In these circumstances, a public employee's right to speak out on such an important matter must be protected from the threat of retaliatory discharge.

Id. It was not significant, said the court, that the grand jury did not return an indictment in the case, so long as the plaintiff in good faith believed the accusations to be true and possessed a reasonable factual basis for such belief. *Id.* at 1063 n. 7.

In *Hickman* v. *Valley Local School District Board of Education,* 619 F. 2d 606 (6th Cir. 1980), the court reversed the dismissal of a plaintiff who had irritated the Principal and Superintendent of Schools by bypassing them on various matters connected with union activities. While the district court held that the discharge was justified because of the personality conflict between the plaintiff and the principal, the court of appeals reversed, holding that the alleged personality conflict germinated from the union activities and that the plaintiff would not have been dismissed but for those activities. *Id.* at 609. The court did note, however, that there was no evidence of any disruption of the school nor was there a question of maintenance of discipline by superiors or harmony among coworkers. The court indicated that much more egregious conduct would be required to uphold such a dismissal, such as direct public criticism of one's immediate supervisor or arousing intense animosity among co-workers. *Id.* See also, *Stone* v. *Board of Regents of University System,* 620 F. 2d 526 (5th Cir. 1980) (disagreement over plaintiff's attempts as member of dean search committee to find qualified minority and female candidates had sufficient public flavor to merit protection); *Harper* v. *Blumenthal,* 478 F. Supp. 176 (D.D.C. 1979), (plaintiff's criticism of his supervisor concerning irregularities in the office was protected since there was no exceptional need for confidentiality in said office and the relationship between plaintiff and his supervisor was not of such a personal and intimate nature that public criticism would seriously undermine its effectiveness, at 183).

The duty of plaintiff to appear before the grand jury is especially clear. Many courts have held that absent the claim of privilege the duty of a citizen to give testimony to a grand jury is

absolute. See, e.g. *United States* v. *Mandujano,* 425 U.S. 564, 571 (1976); *United States* v. *Calandra,* 414 U.S. 338 (1974); *Kastigar* v. *United States,* 406 U.S. 441, 443 (1972); *United States* v. *Alfelbaum,* 584 F. 2d 1264, 1268 (3d Cir. 1978), rev'd on other grounds, ____ U.S. ____, 100 S. Ct. 948 (1980); *Kelly* v. *Gilbert,* 437 F.Supp. 201, 216 (D. Mont. 1976).

Again with reference to the right of a police officer to confront the Attorney General as to why he could not go before the Grand Jury or why the Attorney General would not pursue the case any further, the Supreme Court has spoken many times concerning this right. In *Pickering* v. *Board of Education,* 20 L. Ed. 811, 591 U.S. 563, this court said that absent any proof of false statements knowingly or recklessly made a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

In *New York Times Company* v. *Sullivan,* 376 U.S. at 270 11 L. Ed. at 701, the court said that the first and fourteenth amendments embody our profound national committment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic, and some times unpleasantly sharp attacks on government and public officials.

The most interesting case of *Garrison* v. *Louisiana,* 379 U.S. 64, 13 L. Ed. 2nd 125, is in point in that this court reversed the conviction for criminal libel against Garrison who was the Attorney General, who at a press conference issued libelous statements concerning the judicial conduct of eight judges with whom he was having a dispute. While we do not hold with this method of reproaching judges, we must point out in the case at hand, the policeman went to the privacy of the Attorney General's office and remonstrated with him personally. There is no evidence of public criticism.

CONCLUSION

This request involves a serious question of violations of the rights of individuals by local officials. To order or restrict an officer or a citizen not to appear before a grand jury is a fundamental violation of the First and Fourteenth Amendments to the Constitution. It becomes more involved when a police officer cannot go before a grand jury to testify about a crime the Mayor's friend has committed. If a policeman knows of corruption, must he risk his job by bringing the corruption to light against the orders of his superiors?

As the author of the dissent in the Tennessee Supreme Court said, "it is absolutely intolerable in a free society that any public employee may be forbidden to go before a grand jury and give testimony of facts within his knowledge respecting criminal offenses".

If the Supreme Court of Tennessee's Opinion is allowed to stand anarchy will result. Chief of Police will be allowed to commit violations of the law and order his inferiors not to appear before the grand jury. Graft will again become the rule with immunity. Mayors, City Managers, and Chiefs of Police can laugh at the law. It doesn't apply to the Mayor's friends.

The Chief should have been helping his Officer, especially after the first indictment was nolled becaused of a defect.

The confrontation with the Attorney General was private and there was some good reason for petitioners questioning his lack of cooperation.

For the foregoing reasons petitioner earnestly and respectfully requests this Court to grant the petition for certiorari and set aside the judgment of the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Frank Watts
plaintiff-Applicant

vs.

Civil Service Board For
Columbia
Defendant-Respondent

Application to Appeal from the
Court of Appeals Middle Section

Maury Law

Honorable Joe M. Ingram, Judge

FOR PLAINTIFF-APPLICANT:

Jack B. Henry

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FOR DEFENDANT-RESPONDENT:

Courtney, Fleming & Gray
Columbia, Tennessee

OPINION

Affirmed

Brooks McLemore, Sp. J.

The Civil Service Board for the City of Columbia found city policeman Frank Watts, the plaintiff-applicant (hereinafter called the plaintiff) guilty of "disobeying a written directive of the Chief of Police and conduct unbecoming an officer, both violations of the Standard Operating Procedure Manual of the Columbia Police Department." The Board's action thus affirmed the action of the City Manager in suspending indefinitely the plaintiff from the Columbia Police Department. At the behest of plaintiff, writ of certiorari was issued by the Circuit Court of Maury County to review the action of the Board. After a hearing, the Circuit Court entered a judgment, containing findings of fact, which sustained the action of the Civil Service Board. Upon appeal, the Court of Appeals affirmed the judgment of the Circuit Court. This court granted plaintiff's application to appeal to review that action.

We have duly considered the facts set forth in the plaintiff's motion under Rule 14 for consideration of post-judgment facts.

The issues stated in the plaintiff's brief before the Court of Appeals and in this court, though not identically worded, may be treated as being the same. When the issues are narrowed, the plaintiff contends that a "heated discussion" with the District Attorney General was nothing more than the exercise of his First Amendment rights of free speech as made applicable to the states and its instrumentalities by the Fourteenth Amendment. Secondly, he contends that no one may prevent him from presenting evidence to a grand jury and that he may not be disciplined for this act even though he failed to follow procedures expressly directed to him by his superiors. Finally, the plaintiff contends that the action of a majority of the Civil Service Board was arbitrary because of bias or prejudgment. The Board's position is that the plaintiff was terminated simply and solely because of his lack of cooperation with his superiors by disregarding the proper procedures of the police department when given direct orders and for conduct unbecoming an officer in an oral confrontation with the District Attorney General.

The facts which the Civil Service Board heard and the Circuit Court reviewed were fully set forth in the record certified to the Circuit Court. In addition to the evidence heard before the Civil Service Board, the Circuit Court alone heard evidence with respect to whether or not the Board acted illegally, arbitrarily or capriciously toward the plaintiff.

The parties concede, and we hold, that the scope of court review of the action by the Civil Service Board is that afforded by the common law writ of certiorari. T.C.A. §27-914.

The scope of this review is properly set forth in the Court of Appeals' opinion as follows:

> "In such actions the reviewing court is limited to inquiry as to whether the administrative agency acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Company* v. *Railroad and Public Utilities Commission,* 195 Tenn. 593, 261 S.W.2d 233 (1953).
>
> * * * * * * * * *
>
> Under the common law writ of certiorari, questions of law only will be reviewed by the courts. An action of an administrative agency which is not supported by any evidence is arbitrary and void and may be quashed on common law writ of certiorari. Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency. Any additional evidence offered to the reviewing court is limited to the question of whether the agency exceeded its jurisdiction or acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Co., Inc.* v. *Railroad & Public Utilities Commission,* 195 Tenn. 593, 261 S.W.2d 233 (1953). *People's Bank of Van Leer* v. *Bryan,* 55 Tenn.App. 166, 397 S.W.2d 400, *Bayside Warehouse Co.* v. *Memphis,*

63 Tenn. App. 268, 470 S.W.2d 375, *Brown* v. *Tenn. Real Estate Comm.*, Tenn.App. 1972, 494 S.W.2d 506, Cert. den. 414 U.S. 877, 38 L.Ed.2d 122, 94 Sup. Ct. 54."

In the trial court, under the common law writ, reversal or modification of the action of the Civil Service Board may be had only when the trial court finds that the Board has acted in violation of constitutional or statutory provisions or in excess of its own statutory authority; has followed unlawful procedure or been guilty of arbitrary or capricious action; or has acted without material evidence to support its decision. The trial court does not weigh the evidence. The scope of review by the appellate courts is no broader or more comprehensive than that of the trial court with respect to evidence presented before the Board.

The trial court and the Court of Appeals both were of the opinion that there was material evidence to support the action of the Board. The trial court found that the Board did not act illegally, arbitrarily or capriciously and the Court of Appeals found that the evidence did not preponderate otherwise.

We affirm the judgment of the Court of Appeals.

The plaintiff, a patrolman with twelve years' experience, was requested by one Monty Luna in the latter part of 1975 to find out what had happened to his Luger hand gun that had been confiscated as stolen property by Officers Allen and Duncan of the Columbia Police Department. The plaintiff took this complaint in his capacity as an officer. Luna later testified that this hand gun had been purchased by him from Ernie Anglin for two hundred and fifty dollars. The plaintiff made an investigation and, subsequently, orally reported to the Chief of Police at his home on December 31, 1975. The Chief of Police then made an investigation which included an internal investigation of procedures followed by another officer with respect to possession of the hand gun. Neither an official file nor a report of the results of the investigation was ever made by the plaintiff about his investigation for the records of the Columbia Police Department.

On June 4, 1976, the plaintiff, apparently without the knowledge of his superiors in the police department, testified before the Grand Jury of Maury County in his capacity as a police officer[1] and gave testimony concerning Ernie Anglin. The grand jury returned an indictment against Anglin for the offense of concealing stolen property.

When the accused appeared for trial in January, 1977, the Assistant District Attorney General was of the opinion that the indictment was defective; and he was permitted to enter a *nolle prosequi* with the stated intention of seeking another indictment against the accused.

Later, the plaintiff learned through rumor or "the grapevine" that the District Attorney General was not going to seek indictment. On February 10, 1977, the plaintiff made an appointment with the District Attorney General for the circuit at his office in Lawrenceburg, Tennessee, where a "heated discussion" occurred when the District Attorney General advised the plaintiff, after stating his reasons, that he did not intend to re-submit the Anglin case to the Grand Jury. It is an undisputed fact that the speech in question was uttered completely within the context of plaintiff's employment relationship. The testimony, in part, of General Gay is as follows:

> "Q. When Mr. Watts came to your office on the 10th of February, I believe you stated that as he, well he had left, he raised his voice. Was he hollering at you or what?

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[1]The plaintiff testified that he signed up for and was paid Court pay for time spent going before the grand jury, and also for trial on January 17, 1977. The plaintiff testified, "Well I'm a police officer twenty-four hours a day according to the charter and everything, so anything I do would have to be as a police officer technically. The second time I went I didn't claim it." "Well, the capacity you always go in, you go as a person but your occupation as a policeman."

A. Yes, sir, he raised his voice and could be heard well down on the street. And I, of course, in the first I couldn't appreciate it because the dialogue that we had and as a result of him raising his voice perhaps I raised my voice when I asked him, 'not to shout at me or to raise his voice toward me.' Yes, sir, this occurred in my office."

* * * * * * *

"Q. Now, Mr. Gay, you said you could hear Mr. Watts' voice well down on the street?

A. Oh, I'm sure you could, yes, sir.

Q. And as he left your office, would you state again to the Board what he said to you—

A. He threatened, he threatened in the first place, 'there is going to be further investigation.' He said, first, 'no two-bit politician is going to tell him what to do.' And then he said, 'there'll be a further investigation on this and you may be involved too.' This was as he went down my stairs. My office is on the second floor and I couldn't appreciate a threat . . . ."

* * * * * * * *

"Q. And it was after all of this that he raised his voice where he could be heard down on the street and said you were a two-bit politician? And—

A. Well I don't know, I'm not going to accuse Mr. Watts of saying that I was. The only thing he made reference to is, 'that no two-bit politician was going to tell him.' And then of course when he left and talked about investigations I considered it a threat, and that's the reason that I came and reported the incident to Chief Holton who in turn, by the way, called Mr. Barrett Jones into the office while I was making the statement."

* * * * * * * *

"Q. Were you offended by the statements that he made?

A. Yes I was. I would not have reported it if I had not been. Yes, sir."

* * * * * * * *

"MR. RALPH: He didn't use any profane or —

THE WITNESS: No, sir, I couldn't say that Officer Watts used any profanity."

Plaintiffs account contained the following testimony:

"Q. And this was a very heated discussion between the two of you?

A. Yes, sir, very heated.

Q. And his statement that it could be heard all the way down on the street I assume that's probably right, then, if you're talking pretty loud —

A. I wouldn't doubt if they didn't hear it at the Courthouse.

Q. And you don't deny that you shouted at him?

A. And he shouted at me, yes, sir."

On February 21, 1977, plaintiff received a letter from the Chief of Police, approved by the City Manager, stating:

"Dear Officer Watts:

On February 16, 1977 this office was advised by District Attorney General Bob Gay that you presented a case against a Mr. Ernie Anglin, and it was dismissed in Circuit Court by Judge Sam Lewis on January 17, 1977. General Gay stated that you consulted with him at his Lawrenceburg office on February 10, 1977 at 8:45 a.m. at

which time General Gay informed you that this case would not be represented to the Maury County Grand Jury due to an inadequate case.

I was further advised that your attitude in his office on this matter was conduct unbecoming an officer. It was also mentioned that you attempted to pursue this matter as a civilian, which you cannot do, based on the facts you have already testified to information you obtained as a police officer.

You appeared before the Grand Jury and prosecuted this case in January, 1977 representing yourself as a Columbia Police officer. You were not under any direction or supervision to act as a police officer representing the Columbia Police Department in this case. This is to advise you that you shall not proceed with any evidence to the next Grand Jury or any other court, news media, or any other persons concerning this case unless you have prior clearance from either me or the City Manager. Your conduct representing yourself to the Grand Jury as an authorized representative of the Columbia Police Department is subject to further review.

You have been given previous reprimands regarding policies and procedures of this department without going through the official channels. Your conduct and investigation into this matter without approval of the proper authorities is in defiance of previous reprimands, and you will be notified of the specific disciplinary measures to be taken."

Shortly thereafter, the plaintiff showed the letter to two members of the judiciary. One of these judges told the plaintiff that no one could prevent an individual from going before the grand jury and that he considered the order not to go before the grand jury an illegal order. One of the judges told him that every man, no matter what his job has a duty and obligation to

appear before the grand jury and present evidence that he has regarding any crime. The plaintiff testified that he relied on the conversations with the two judges.

Both judges testified at the hearing before the Board. We gather from their testimony that the judges only knew what the letter of February 21 stated and did not know all the facts in the case. Certainly at that time they did not know the contents of the letter from the Chief of Police dated March 10. Both recognized that the Police Department must have rules and regulations conditioned, of course, that they be lawful rules and regulations.

The plaintiff testified before the Board that no one complained about his going before the grand jury in the Anglin matter on June 4, 1976, until after he had had his "heated" conversation on February 10, 1977, with the District Attorney General who complained to the Chief of Police about the plaintiff's conduct and attitude. It was in the letter of February 21, 1977, from the Chief of Police that he first received any orders about going before the grand jury. The plaintiff, having already made up his mind to go before the grand jury if permission were denied him, hand-delivered a letter to the City Manager on March 9, 1977, requesting permission to go before the grand jury. In this letter, the plaintiff stated that he had no new evidence to present to the grand jury other than that presented in June, 1976.

On March 10, 1977, the Chief of Police, in a letter approved by the City Manager, wrote the plaintiff as follows:

> "Dear Officer Watts:
>
> This letter is in answer to your request of March 9, 1977 to appear before the Grand Jury on an Ernie Anglin case. You stated in your request that you had no additional information and only wanted to return to the Grand Jury because the previous trial was dismissed due to an error.

> It is the opinion of this office that since no record or case number was ever entered into the files with the Columbia Police Department on this case that your request be denied. If this is to be pursued and you would share your information and evidence with our Detective Division which handles our investigative matters on criminal problems, and if upon their investigation with your aid and evidence found probable cause to prosecute this case, this department would certainly grant you permission to do so.
>
> After conferring with the Attorney General, it was his opinion that there was evidence lacking in this case. It was stated in your previous reprimand that you did not have a case against Mr. Ernie Anglin, and therefore, your permission to pursue this case is denied. Your letter of reprimand concerning this matter dated February 21, 1977 still stands."

Thereafter, without further consultation with any city or police official, the plaintiff appeared before the Maury County Grand Jury without being subpoenaed and testified in support of the reindictment of Anglin on the charge of concealing stolen property. At this time, he was asked whether he had discussed the case with city detectives.

The grand jury did not indict Anglin.

On April 21, 1977, Ernie Anglin filed suit for damages in the Circuit Court at Columbia against the plaintiff and the City of Columbia; and he alleged, among other things, that the plaintiff's actions during the May Term of the grand jury "procuring an indictment against the plaintiff for concealing stolen property . . . were carried out . . . maliciously, and without probable cause. . . ."[2]

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[2]On August 24, 1978, the plaintiff Anglin took a voluntary non-suit "with prejudice" in this suit.

Subsequently, on April 25, 1977, the plaintiff was suspended indefinitely, as previously stated, for violation of two mandates of the Columbia Police Department Manual, which are as follows:

> "All lawful orders of superior officers shall be cheerfully faithfully and promptly obeyed and enforced without question or argument. If any officer does not clearly understand an order, he shall ask for such information as may be necessary for a clear understanding, but under no circumstances shall he quetion the authority of a superior officer or engage in any argument concerning the order given."
>
> * * * * * * * *
>
> "Members shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentive and respectful and shall exercise patience and discretion in the performance of their duties. At no time shall they use coarse, profane or insolent language to any citizen, nor shall they speak disparagingly of any nationality, race, creed, religion or political belief."

The City Manager testified as to his reasons for the suspension of the plaintiff:

> "Well Mr. W[illegible]ts had very willfully disobeyed a written order of his superior officer and it appeared to me that he was, just wanted to put the Chief and/or the City to a test as to who is to supervise the Department and that it was a very clear-cut case of whether or not he was going to be subject to any direction by the Department or his employers and he defied the action of the Chief of Police. That was one reason. And then of course his conduct in the office of the Attorney General was another matter and I would certainly feel that any police officer and any city employee, especially any police officer, would have an

obligation to conduct themselves in a businesslike manner when talking with any members of the public and certainly with the Attorney General of this District and I felt those were both very serious matters and I felt that he deserved an indefinite suspension for this."

He further testified as to his intentions and the procedures of the police department:

"Q. Did you intend to just flatly deny Mr. Watts the right to ever appear before the Grand Jury regarding this case?

A. I think we made it very clear to Mr. Watts that all we were asking is that he follow procedures of the Department in pursuing this or any other case, that there should be a file established on the Department, and it should go through the Department investigative division.

Q. Is there any way to your knowledge for the Columbia Police Department to determine what their officers are doing without following this procedure?

A. I wouldn't be aware of any way you could.

Q. Did Officer Watts subsequent to the time that you wrote this letter, did he ever at that time turn over any evidence or work in conjunction with the Department, the Detective Department as instructed in that letter?

A. No.

Q. To your knowledge on today's date, has the City of Columbia got any file on this particular case?

A. Not to my knowledge."

The foregoing evidence constitutes material evidence to support the finding of the Civil Service Board. With such evidence, the matter is foreclosed unless the Board has acted fraudulently, illegally or arbitrarily.

We now turn to that aspect of the case.

As to the issue of illegality, counsel for plaintiff argues that two important constitutional questions are presented: one federal and one state. Counsel for the Board argues that if the proper officials of a police department cannot require subordinates to follow reasonable rules and procedures, then chaos will result. Counsel have cited no Tennessee case in point, and our research has revealed none.

Certainly, we agree that acts of a police officer that are afforded constitutional protection cannot be the basis of loss of employment where that employement is protected by a civil service system. Indeed, it has been held that government employees who are not protected by contractual or tenure "rights" may not be dismissed for engaging in constitutionally protected speech. *Perry* v. *Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed.2d 570 (1972).

Furthermore, we recognize that, "[P]olicemen . . . are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey,* 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). A public employee does not forfeit his protection against governmental abridgment of freedom of speech if he expresses his views privately rather than publicly. *Givlan* v. *Western Line Consolid. Sch. Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). The court in *Givhan, supra,* stated in a footnote:

> "Private expression, however, may in some situations bring additional factors to the *Pickering [infra]* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Id.,* footnote 4, 58 L.Ed.2d 619, 624.

Though freedom of speech holds a preferred position in the roll call of constitutional guarantees of individual freedoms, the guarantee is not absolute. No all restraints on a public employee's speech are prohibited. The rights of the public employee-speaker can be balanced against the rights of the governmental employer. *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In that case, the Supreme Court of the United States said:

> "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [public employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.,* 20 L.Ed.2d at 817.

Municipal police forces are a para-military force by virtue of their organized structure, central control, discipline and uniform dress and the fact that they bear arms. A member of this type of organization may, by his speech and conduct, more readily create problems of maintaining discipline by immediate superiors or disharmony among co-workers and others whose responsibility it is to maintain law and order in society than by persons in other types of government employment. The public expects a higher standard of personal conduct of a police officer than that of an ordinary governmental employee.

A patrolman may speak freely as to content and manner as long as he does not harm or impair the administration of the police department. He may speak as he pleases and level charges at those with whom he and his department must work. But, if the exercise of this privilege disrupts his own work and the proper functioning of the public's business, he is subject to

discharge for cause without it being said that he was denied his freedom of speech. *See* 4 McQUILLIN MUN. CORP. §12.240 (3rd rev. ed. 1979). Dissent and criticism are not prohibited, but courteous communication with officials who share in his responsibility to enforce laws and with the public in general may be required without violation of First Amendment rights.

This is not a case where the plaintiff has been punished for publicly criticizing the actions of his superiors or policies of the police department, nor is this a case where overbroad or vague department rules are involved. The mandates here involved are reasonable. One is not required to guess what conduct is demanded or what utterances are proscribed.

The District Attorney General is the prosecutor of persons charged with crime in this state; and in such capacity, the officers of a police department must constantly advise and deal with him or his assistants. The evidence regarding the "heated discussion" and confrontation with the District Attorney General, as set forth, *supra,* and other evidence in the record, are sufficient to support the action of the Board in finding that the plaintiff was guilty of violating the mandate against using insolent (or insulting)[3] language to any citizen, which resulted in conduct unbecoming an officer such as to impair his performance of his duties. The District Attorney General, having complained, is evidence that the plaintiff's work with that official was impaired.

On the question of First Amendment rights, the plaintiff has cited in addition to *Pickering, supra: New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1965); *In Re Hickey,* 149 Tenn. 344, 258 S.W. 417 (1923).

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[3] There is some confusion as to which was the correct word. The result would be the same with either word.

We have considered these cases and are not persuaded in the plaintiff's favor by them. In *Pickering,* the fact of employment was only tangentially and insubstantially involved in the public communication. Public statements made by a school teacher were in no way directed towards any person with whom the teacher would normally be in contact in the course of his daily work as a teacher. There was no question of maintaining either discipline by immediate superiors or harmony among co-workers as is presented here. There is a difference between the operation of schools and the operations of a disciplined and efficient police department. *Garrison* dealt with a criminal defamation conviction stemming from statements made at a press conference by a district attorney about the judges before whom he regularly appeared. *Hickey* involved contempt of court and disbarment for utterances and written statements made outside the presence of the court. *Times* dealt with a libel suit arising out of an advertisement signed by private citizens, criticizing a public official in his official capacity.

We find no merit to the plaintiff's contention that his First Amendment rights have been violated by the Board.

We agree with the statement that no one may prevent a person from appearing before a grand jury. Indeed, it is his duty to do so if he has evidence of a crime. The District Attorney may ask for an indictment, or the grand jury may act by presentment.

However, we are of the opinion that there is material and substantial evidence that the act of the plaintiff's appearance before the grand jury is not the reason that the plaintiff was suspended indefinitely. We think that there is material, substantial and convincing evidence that the real issue was whether the plaintiff was subject to obedience to orders of his superiors. What was demanded of the plaintiff was that he handle his investigation in accordance with official channels, police policies and procedures and in cooperation with the Detective Division.

The plaintiff, in his actions, was acting in his official capacity as a police officer of the City of Columbia. He drew court pay for his appearance before the Grand Jury on June 4, 1976. Under some circumstances, the City may sustain exposure to liability for unlawful or tortious acts of its employees presumptively acting in the course of their employment. Those in charge of maintaining a competent police force exposed to such liability must keep up with the latest statutes and court decisions and must be continuously vigilant in the fulfillment of their supervisory obligations.

We quote with approval from the opinion of the Court of Appeals in the instant case prepared for that Court by Judge Todd:

> "If plaintiff had seen fit to obey instructions by sharing information with designated policy officials and if such officials had deemed plaintiff's information to be insufficient for prosecution, then the proper official of the police department would have had the authority to forbid plaintiff to prosecute *in his capacity as a policeman.* In this event, plaintiff would retain his right *as an individual* to appear before the Grand Jury; and the police department would have a right to disavow any authorization for or connection with the prosecution in order to assure that civil liability for the prosecution rested solely upon plaintiff as an individual, and not upon the City for official acts of one of its policemen."

The plaintiff has previously been involved in litigation which ultimately reached this Court in regard to the manner of selection of the Assistant Chief of Police. *Blair* v. *State ex rel. Watts,* 555 S.W.2d 709 (1977). He testified in the instant case that, "Well, they call me Ralph Nader of the Police department. I just hate to see crooked politics going on." We also think it is significant that communications between a patrolman and the Chief of Police and the City Manager had degenerated to the point that they were in writing. The record does not disclose, insofar as we are able to find, the number of policemen in the Col-

umbia Police Department; however, the Tennessee Blue Book published by the Secretary of State shows the 1974 population of Columbia as being 21,472. It would be surprising in a department of that size if communications in writing between the officers and the Chief were the norm.

Obedience to reasonable orders to prepare files for record and consultation with superior officers in a paramilitary organization such as a city police force can be expected. The need for obedience in a police force is not just desirable, but oftentimes compelling. Each citizen cannot be policed by his own private constable. There must be widespread voluntary compliance with the law. Except under the most unusual circumstances, citizens are required to submit to the authority of police officer. It is elementary that if there is to be order in an evergrowing population, then citizens should show a great degree of respect to them. As previously stated in the discussion of First Amendment Rights, to maintain this respect requires a measure of conduct in an officer that is above that expected of government employees in general. Proper respect by subordinates for superior officers is necessary for the maintenance of public confidence. The plaintiff's failure to prepare a file on his investigation and consult with his superiors is conceded. We do not think that the plaintiff's right to appear before a grand jury necessarily insulates him from discipline as a result of this failure.

The plaintiff tesified that he had completed his investigation of the Anglin matter. He had a "heated" confrontation with the District Attorney General who complained to his superiors who wrote the letters previously quoted. He consulted with two judges and testified that he consulted with two lawyers, but he failed or refused to consult with his superiors as directed. When asked, "Why wouldn't you at least pay them the courtesy of giving them the information that you had as you had been instructed by the Chief of Police," he responded: "he said 'to see if I had probable cause.' I didn't need them to see if I had prob-

able cause, the grand jury already told me I had probable cause. Every arrest an officer makes is probable cause and I've been on the force twelve years and I guess I know about as much about probable cause as they do and been to as many schools as they have."

The Civil Service Board was entitled to conclude from the evidence before it the following: (1) the officer's conduct was subversive of discipline and constituted a rebellious challenge to the authority of his superior officers; (2) the toleration of such conduct would be disruptive to harmony and efficiency in the police department; and (3) the reason for his suspension was not his appearance before the Grand Jury as an individual, but that such appearance as a police officer was only evidence of his refusal to obey procedures laid down in writing by his superiors.

We conclude, as did the Court of Appeals, that the Board was acting upon substantial evidence and proper, legal and constitutional grounds in finding plaintiff guilty of misconduct meriting discipline.

The plaintiff contended in the trial court that at least one member of the Civil Service Board was biased and had prejudged his case and, since the vote to suspended was three to two and the member alleged to be biased or guilty or prejudgment voted with the prevailing side, the Board had acted illegally or arbitrarily.

The plaintiff in his brief states, "On this issue, the reviewing court weighs the evidence and determines by a preponderance of the proof whether the lower tribunal acted illegally or arbitrarily," citing *Peoples Bank of Van Leer* v. *Bryan,* 55 Tenn.App. 166, 174, 397 S.W.2d 401, 405 (1965).

Non-jury judgments are presumed correct unless the evidence preponderates otherwise. T.C.A. §27-303.

Evidence was presented by both parties on this issue. This evidence included the record of the hearing before the Board

and oral testimony of witnesses heard by the trial court. The testimony presented for the first time before the trial court was conflicting and, therefore, involved the credibility of witnesses and the preponderance of the evidence. The trial court, as previously stated, found adversely to the plaintiff. In our review of the case, we have carefully read the record before the Civil Service Board and the additional evidence presented to the trial court. When all evidence and inferences therefrom are considered, we agree, as did the Court of Appeals, that the evidence does not preponderate against the finding of the trial court.

Accordingly, the judgment of the Court of Appeals is affirmed. That is, the action of the Circuit Court in sustaining the action of the Civil Service Board is affirmed; the petition of the plaintiff for certiorari is dismissed; and all costs, including costs in this Court, are taxed against the plaintiff-applicant and his surety.

/s/ Brooks McLemore, Sp. J.

CONCUR:

COOPER, J.
HARBISON, J.

DISSENT:

BROCK, C.J.
FONES, J.

DISSENTING OPINION

I respectfully dissent.

Stripped of the protective verbiage surrounding it, the plain truth is that the plaintiff was fired because he testified before a grand jury in violation of an ultimatum from the Chief of Police that he not do so.

That ultimatum is as follows:

> "This is to advise you that you shall not proceed with any evidence to the next Grand Jury or any other court, news media, or any other persons concerning this case unless you have prior clearance from either me or the city manager."[1]

In my view this attempt by the Chief of Police of the City of Columbia to shut the mouth of officer Watts is totally invalid on its face. Such a gross, sweeping attempt to deprive the plaintiff of his right to speak clearly violates his rights under the freedom of speech guaranties of both the State and Federal Constitutions. See the *Perry, Garrity, Pickering* and *Givhan* cases cited in the majority opinion.

This attempted "gag order" is invalid, however, for a different reason, i.e., every citizen has access to testify before the grand jury in this state. Any attempt to cut off that access is against public policy. The grand jury may act by presentment as well as by indictment. It is absolutely intolerable in a free society that any public employee may be forbidden to go before a grand jury and give testimony of facts within his knowledge respecting criminal offenses. Police officers sometimes become aware of criminal offenses committed by other police officers or their superiors, or their civilian cronies. When this occurs, is the officer to run the risk of losing his employment if he testifies before the grand jury with respect to such offenses in spite of a "gag order" such as the one here? Let us hope not.

I would hold that the "gag order" attempted here was invalid and, thus, that its violation is insufficient ground to discharge officer Watts.

---

[1] Letter from Chief of Police to plaintiff received February 21, 1977.

Although it is clear to me that the charge of conduct unbecoming an officer was not really the basis, or part of the basis, for plaintiff's discharge, if it were I would hold that there is no material evidence upon which to make this finding here. The conversation between the plaintiff and the District Attorney General was private. Moreover, there was provocation for such display of temper on the part of officer Watts as occurred.

I would reverse.

/s/ BROCK, C.J.

FONES, J., JOINS IN THIS
DISSENT

APPENDIX "B"

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Frank Watts
Plaintiff-Applicant

vs.

Civil Service Board for Columbia
Defendant-Respondent

OPINION ON PETITION TO REHEAR

After due consideration the petition to rehear filed by FRANK WATTS is denied. Costs incident to the filing of the petition will be paid by FRANK WATTS and his surety.

All members of the Court adhere to their original opinions.

/s/ Brooks McLemore, Sp. J.

Concur:
Cooper, J.
Harbison, J.

Dissenting:
Brock, C.J.
Fones, J.

APPENDIX "C"

CITY OF COLUMBIA
DEPARTMENT OF POLICE
COLUMBIA, TENNESSEE 38401

Edward L. Holton
Chief of Police

February 21, 1977

Officer Frank Watts
102 South Bigby Drive
Columbia, Tennessee 38401

Dear Officer Watts:

On February 16, 1977 this office was advised by District Attorney General Bob Gay that you presented a case against a Mr. Ernie Anglin, and it was dismissed in Circuit Court by Judge Sam Lewis on January 17, 1977. General Gay stated that you consulted with him at his Lawrenceburg office on February 3, 1977 at 8:45 a.m. at which time General Gay informed you that this case would not be represented to the Maury County Grand Jury due to an inadequate case.

I was further advised that your attitude in his office on this matter was conduct unbecoming an officer. It was also mentioned that you attempted to pursue this matter as a civilian, which you cannot do, based on the facts you have already testified to information you obtained as a police officer.

You appeared before the Grand Jury and prosecuted this case in January, 1977 representing yourself as a Columbia Police officer. You were not under any direction or supervision to act as a police officer representing the Columbia Police Department in this case. This is to advise you that you shall not proceed with any evidence to the next Grand Jury or any other court, news

media, or any other persons concerning this case unless you have prior clearance from either me or the City Manager. Your conduct representing yourself to the Grand Jury as an authorized representative of the Columbia Police Department is subject to further review.

You have been given previous reprimands regarding policies and procedures of this department without going through the official channels. Your conduct and investigation into this matter without approval of the proper authorities is in defiance of previous reprimands, and you will be notified of the specific disciplinary measures to be taken.

Sincerely yours,

/s/ Edward L. Holton
Chief of Police

ELH:nc

cc: City Manager
Employee's file
Civil Service files

APPROVED: Barrett H. Jones, City Manager

RECEIVED BY: Frank Watts

APPENDIX "D"

March 9, 1977

Mr. Barrett H. Jones
City Manager
Columbia, TN.

Mr. Jones:

I Frank Watts request permission to go before the Grand Jury that is now in session with the same evidence that I had when I went before them in June of 1976, and got an indictment against Mr. Ernie Anglin.

The case was dismissed by request of the District Attorney Generals' office, due to the fact that they made an error in the indictment.

I have no further evidence in this case. I need an answer right away.

Thank you,

Officer Frank Watts
Columbia Police Dept.

APPENDIX "E"

CITY OF COLUMBIA
DEPARTMENT OF POLICE
COLUMBIA, TENNESSEE 38401

Edward L. Holton
Chief of Police

March 10, 1977

Officer Frank Watts
102 South Bigby Drive
Columbia, Tennessee 38401

Dear Officer Watts:

This letter is in answer to your request of March 9, 1977 to appear before the Grand Jury on an Ernie Anglin case. You stated in your request that you had no additional information and only wanted to return to the Grand Jury because the previous trial was dismissed due to an error.

It is the opinion of this office that since no record or case number was ever entered into the files with the Columbia Police Department on this case that your request be denied. If this is to be pursued and you would share your information and evidence with out Detective Division which handles our investigative matters on criminal problems, and if upon their investigation with your aid and evidence found probable cause to prosecute this case, this department would certainly grant you permission to do so.

After conferring with the Attorney General, it was his opinion that there was evidence lacking in this case. It was stated in your previous reprimand that you did not have a case against Mr. Ernie Anglin, and therefore, your permission to pursue this case is

denied. Your letter of reprimand concerning this matter dated February 21, 1977 still stands.

Sincerely,

/s/ Edward L. Holton
Chief of Police

ELH:nc

APPROVED: Barrett H. Jones,
City Manager

APPENDIX "F"

CITY OF COLUMBIA
CITY HALL
COLUMBIA, TENNESSEE 38410

April 25, 1977

Office of the
City Manager

Mr. Frank Watts
Columbia Police Department
Columbia, Tennessee 38410

Dear Mr. Watts:

Please consider this letter as notice that you have been suspended indefinitely from the Columbia Police Department effective this date. The reason for this suspension is because of: (1) Your disobeying a written directive of the Chief of Police, and (2) Your conduct unbecoming an officer on or about February 3, 1977, both violations of the Standard Operating Procedure Manual of the Columbia Police Department.

Your attention is invited to Section 6.15 of the Columbia City Charter which details your rights and privileges regarding your suspension.

Sincerely,

/s/ Barrett H. Jones
City Manager

BHJ:pr

Copy to: Chief of Police
Civil Service Board
City Recorder

No. 80-1212

FEB 13 19
ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

October Term, 1980

FRANK WATTS,
Petitioner,

vs.

CIVIL SERVICE BOARD FOR THE CITY OF COLUMBIA, TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

ROBIN S. COURTNEY
(Counsel of Record)
WILLIAM S. FLEMING
COURTNEY & FLEMING
214 West Seventh Street
Columbia, Tennessee 38401
(615) 388-0832
Attorneys for Respondent

F. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

STATEMENT OF QUESTIONS PRESENTED

1. Did the Supreme Court of the State of Tennessee err in affirming the decision of the Civil Service Board of the City of Columbia, Tennessee, when the Civil Service Board approved the discharge of Officer Frank Watts for his failure to follow the written directives of the Chief of Police of the City of Columbia?

2. Did the Supreme Court of the State of Tennessee err in affirming the decision of the Civil Service Board of the City of Columbia, Tennessee, that discharged Officer Frank Watts of the City of Columbia Police Department for using insulting language in a heated discussion with the District Attorney General?

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No. 80-1212

In the Supreme Court of the United States

October Term, 1980

FRANK WATTS,
Petitioner,

vs.

CIVIL SERVICE BOARD FOR THE CITY OF COLUMBIA, TENNESSEE,
Respondent.

BRIEF OF RESPONDENT, THE CIVIL SERVICE BOARD OF THE CITY OF COLUMBIA, TENNESSEE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Your Respondent, the Civil Service Board of the City of Columbia, Tennessee, respectfully requests that the Court deny the Petition for Writ of Certiorari filed by Petitioner Frank Watts seeking a review of the opinion of the Supreme Court of the State of Tennessee, at Nashville Tennessee, dated September 8, 1980. Petition to Rehear denied by an opinion dated October 20, 1980.

STATEMENT OF CASE

This case grows out of the termination of the Petitioner, Frank Watts, as a policeman for the City of Columbia, Tennessee. On its face, the petition seeks to raise constitutional questions which have been thoroughly explored and rejected by both the Circuit Court for Maury

County, Tennessee, the Court of Appeals, Middle Section at Nashville, Tennessee (See Op. of Ct. App. included in this volume as Appendix "A", p. 15), and the further opinion of the Supreme Court of the State of Tennessee, set forth in full in Appendix "A", pp. 1-20, of the Petition for Certiorari.

The Petitioner, Frank Watts, was until April 25, 1977, a member of the Columbia Police Department. On that date he was suspended indefinitely by Mr. Barrett Jones, City Manager of the City of Columbia, Tennessee. The charges as set out in the City Manager's letter of April 25, 1977, for which charges the Petitioner was suspended, were:

"(1) Your disobeying a written directive of the Chief of Police, and

"(2) Your conduct unbecoming an officer on or about February 3, 1977, both violations of the Standard Operating Procedure Manual of the Columbia Police Department." (Said letter is set forth in full in the Petition for Certiorari in Appendix "F", p. 29)

A hearing was held before the Civil Service Board of Columbia. The Board upheld the suspension of the Petitioner.

The Petitioner filed a common law writ of certiorari in the Circuit Court for Maury County, Tennessee, which was granted. The provisions of this appeal are governed by *Tennessee Code Annotated,* §27-914. The Circuit Court for Maury County, Tennessee, upheld the decision of the Civil Service Board of the City of Columbia in suspending the Petitioner. The Petitioner filed a motion for a new trial which was overruled, after which the Petitioner prayed an appeal, which was granted. The Petitioner's

appeal was defective in that the appeal bond was not properly executed. The Petitioner then filed a motion for writ of error, accompanied by a bond, certified transcript and the assignments of error and brief of law. The Court of Appeals for the Middle Section at Nashville, Tennessee, affirmed the judgment of the trial court after due consideration. (Op. reproduced herein in Appendix "A", p. 15) An appeal was then prayed to the Supreme Court for the State of Tennessee, which was granted. The Supreme Court for the State of Tennessee rendered an opinion dated September 8, 1980, wherein the actions of the lower courts and the Civil Service Board of the City of Columbia, Tennessee, were affirmed.

The factual situation upon which this case is based is as follows. The Petitioner, Frank Watts, went before the Maury County Grand Jury on June 4, 1976, in his capacity as a police officer for the City of Columbia, Tennessee. The City of Columbia, Tennessee, was totally unaware of Officer Watts' appearance before the Grand Jury until after his appearance had been made. The Grand Jury then returned an indictment against one Ernie Anglin for concealing stolen property. The case subsequently came on for trial on January 17, 1977, wherein it appeared there was a defect in the indictment. The Assistant Attorney General then moved that the case be nolled.

On February 21, 1977, the Petitioner, Frank Watts, received a letter from the Chief of Police of the City of Columbia. This letter was approved by Barrett Jones, the City Manager of the City of Columbia, Tennessee, that stated that Officer Watts was not to pursue the case against Ernie Anglin any further without first obtaining clearance from either the Chief of Police or the City Manager. (See Appendix "C", pp. 24-25, to petition for certiorari) Specifically, the Chief of Police and the City Manager of Co-

lumbia requested that any proceedings undertaken in the case be done through the proper official channels and by observing the Police Department regulations, policies and procedures.

Petitioner, Frank Watts, subsequently wrote a letter to the City Manager on March 9, 1977 (See Appendix "D", p. 26, to petition for certiorari), requesting permission to go before the Grand Jury. Since the Petitioner had failed to make any record of the case he was investigating, this permission was denied. He was advised if he desired to pursue this investigation to share his information and evidence with the Detective Division which handles investigative matters on criminal problems, and if, upon their investigation with his aid, the evidence supported a finding of probable cause to prosecute this case, the department would certainly grant permission to present the case to the Grand Jury. (See letter dated March 10, 1977, Appendix "E", pp. 27-28, to petition for certiorari)

The Petitioner, Frank Watts, then, without even consulting the Detective Division of the City of Columbia Police Department or setting up a case file on the investigation af Anglin, or in any manner seeking to coordinate his efforts with the City of Columbia Police Department appeared again before the Grand Jury. The Grand Jury did not indict Ernie Anglin after this appearance.

The Petitioner then approached Robert H. Gay, District Attorney General for the Eleventh Judicial Circuit of the State of Tennessee, at his office in Lawrenceburg, Tennessee. The Petitioner questioned the Attorney General concerning his office's failure to pursue any further indictments against Ernie Anglin. The Attorney General testified in summary that there was a problem with the statute of limitations in pursuing the case since the gun that was allegedly stolen was located pursuant to a search

warrant issued in 1972; that the statute of limitations for the crime was four years and that his office's previous investigation during 1973 and 1974 of this case, he felt was adequate.

The discussion between the Petitioner and the Attorney General then became a very "heated discussion". The Attorney General advised the Petitioner that if he was going to continue to raise his voice that he would ask him to leave because he didn't think it was proper for the Petitioner to address the Attorney General in the manner and voice that he was using. Attorney General Gay then further testified, as is found in the B.E. Ex. 16-A, p. 96:

> "He [Frank Watts] got up to leave and then as I stood up, I was going to escort him to the door as I do anyone who comes to my office, he pointed his finger and he said, 'Now there's going to be further investigation of this and perhaps your office.' And he used the words, and why I do not understand, 'that no two-bit politician is going to keep him from presenting a case to the grand jury.'" (Brackets added)

The Attorney General then reported this incident to the Chief of Police of the City of Columbia, on February 16, 1977.

Attorney General Gay at the hearing advised the Board that he investigated the case after his discussion with the Petitioner and found that the Petitioner had never reported his investigation of the case to the proper authorities with the Police Department of the City of Columbia, and that he had personally checked to see whether or not there was any offense report filed with the City of Columbia and that his investigation revealed that there was no file in this case whatsoever at the City

of Columbia Police Department. The Attorney General further checked to see whether the procedures that were normally followed by the City of Columbia Police Department had in fact been followed in this case and determined that they had not. That there was no offense report of the crime either filed with the City of Columbia or with the Maury County Sheriff's Department.

The Attorney General further stated that he checked with the Tennessee Bureau of Investigation and also with the Alcohol, Tobacco and Firearms Division of the Federal Government concerning this case and after checking all of these sources ascertained that this was a private investigation of a police officer carried on outside the scope of the normal operations of the City of Columbia Police Department. Attorney General Gay then testified, as is found in the B.E. Ex. 16-A, p. 102:

> "He threatened, he threatened in the first place, 'there is going to be further investigation.' He said, 'first, no two-bit politician is going to tell him what to do.' And then he said, 'there'll be a further investigation on this and you may be involved too.' This was as he went down my stairs. My office is on the second floor and I couldn't appreciate a threat. Our office is open. It's open to public scrutiny. As a matter of fact, we owe our stewardship in our office to the public, they elected us, and this is the procedure we follow."

Chief Edward Holton, the Chief of Police of the City of Columbia, read into the record Sections D.08 and G.13 of the Columbia Police Department Manual, as follows:

> "A 'All lawful orders of superior officers shall be cheerfully, faithfully and promptly obeyed and enforced without question or argument. If

any officer does not clearly understand an order, he shall ask for such information as may be necessary for a clear understanding but under no circumstances shall he question the authority of a superior officer or engage in any argument concerning the orders given.'

"Q And if you would, read please from page 15 of the Columbia Police Department Manual, Section G.13.

"A 'Members shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentive and respectful and shall exercise patience and discretion in the performance of their duties. At no time shall they use coarse, profane or insultant (sic) language to any citizen or shall they speak disparingly of any nationality, race, creed, religion or political belief.'" (B.E. Ex. 16-B, pp. 134, 135)

Chief Holton further testified that "Everybody [in the Police Department] is given a copy of the manual and has a certain length of time to read it and familiarize themselves with it." Chief Holton testified that he felt sure that Mr. Watts was familiar with the manual. (B.E. Ex. 16-B, pp. 135, 136) (Brackets added)

Barrett Jones, City Manager of the City of Columbia, testified that he did send the letters of February 21, 1977 and March 10, 1977, to Officer Frank Watts. (B.E. Ex. 3 and 4) Mr. Jones further testified "that if he [Frank Watts] felt he needed to conduct an investigation of this matter he should do so within the Police Department." (B.E. Ex. 16-A, p. 18) (Brackets added) Barrett Jones further testified that there was no record at the Columbia Police Department that this matter was being investigated by a Columbia policeman. (B.E. Ex. 16-A, p. 19) Mr.

Jones was then contacted by Attorney General Gay, who stated "that Mr. Watts had come to his office and that Mr. Watts had wanted to prosecute this case and that Mr. Watts was very belligerent, shouting, obnoxious in his office regarding the prosecution of this case, and that he created some little scene in the office." (B.E. Ex. 16-A, p. 20)

The City Manager then testified as follows:

"Q Did you intend to just flatly deny Mr. Watts the right to ever appear before the Grand Jury regarding this case?

"A I think we made it very clear to Mr. Watts that all we were asking is that he follow procedures of the Department in pursuing this or any other case, that there should be a file established in the Department, it should go through the Department investigative division.

"Q Is there any way to your knowledge for the Columbia Police Department to determine what their officers are doing without following this procedure?

"A I wouldn't be aware of any way you could.

"Q Did Officer Watts subsequent to the time that you wrote this letter, did he ever at that time turn over any evidence or work in conjunction with the Department, the Detective Department as instructed in that letter?

"A No.'

The City Manager then testified as to reasons for the suspension of Officer Frank Watts:

"Well Mr. Watts had very willfully disobeyed a written order of his superior officer and it appeared to me

> that he was, just wanted to put the Chief and/or the City to a test as to who is to supervise the Department and that it was very clear-cut case of whether or not he was going to be subject to any direction by the Department or his employers and he defied the action of the Chief of Police. That was one reason. And then of course his conduct in the office of the Attorney General was another matter and I would certainly feel that any police officer and any city employee, especially any police officer, would have an obligation to conduct themselves in a business-like manner when talking with any members of the public and certainly with the Attorney General of this District and I felt those were both very serious matters and I felt that he deserved an indefinite suspension for this." (B.E. Ex. 16-A, pp. 31, 32)

All of the courts that have reviewed this decision of the Civil Service Board have agreed that the order that Officer Watts disobeyed was a lawful order requiring Officer Watts to cooperate with his superior officers and fellow employees in the conduct of the Anglin investigation. The courts have further held that Officer Watts by his own admission failed to cooperate with his superior officers. That the orders given to Officer Watts were not intended to interfere with the individual rights of Officer Watts to appear before the Maury County Grand Jury. The orders merely set forth the procedure that Officer Watts as a member of the Columbia Police Department was to follow in pursuing a criminal investigation.

The Court of Appeals, for the Middle Section at Nashville, Tennessee (Opinion at Appendix "A", p. 15), and the Supreme Court for the State of Tennessee held that there was substantial material evidence to support the

finding that the Petitioner was guilty of violating the police regulation against coarse, profane or insulting language. Secondly, that there was substantial evidence and proper legal constitutional grounds in finding the plaintiff guilty of misconduct meriting discipline. Thirdly, that the constitutional right of free speech allows reasonable expressions of opinion, but does not prevent a police department from limiting the manner of expression by its members.

ARGUMENT AND CITATION OF AUTHORITY

Your Respondent submits that the Petition for Writ of Certiorari should be denied, since it totally fails to raise any federal questions of substance but seeks review in a case where the main questions are questions of fact.

The Supreme Court for the State of Tennessee in its opinion held that this was not a case where the plaintiff was punished for publicly criticizing the actions of his superiors or policies of the police department, nor is this a case where overbroad or vague department rules are involved. The mandates here involved are reasonable. One is not required to guess what conduct is deemed or what utterances are prescribed. (Sup. Ct. Op. Appendix "A" to Petition for Certiorari, p. 15) Perhaps one of the leading cases concerning the First Amendment rights of public employees is the case of *Pickering v. The Board of Education*, 391 U.S. 563, 99 Sup. Ct. 1731, 20 L. Ed. 2d 811 (1968). In this case, a public school teacher was discharged because of a letter to the editor of a local newspaper that he wrote criticizing the Board of Education's Superintendent of Schools on the subject of revenues for the schools. In the *Pickering* case the Court found that the statements made by Pickering were in no way directed towards any person with whom Picker-

ing would normally be in contact in the course of his daily work as a teacher. The Court in *Pickering* found that no peculiar state interest arising from the employment relationship was at stake and that Pickering was, therefore, entitled to the same First Amendment protection afforded the general public. In the case of *Kannisto v. City and County of San Francisco,* 541 F. 2d 841 (1976), the Ninth Circuit, in a case very similar to the one at Bar, held that a regulation proscribing conduct of a member tending to subvert the good order, efficiency or discipline of the department or to inflict discredit upon the department or any member was not unconstitutionally applied in violation of the First Amendment rights of the police lieutenant. In this case, Lieutenant Kannisto had made disrespectful and disparaging remarks about a superior officer while addressing his subordinates during a morning inspection. He had described his superior as a most unreasonable, contrary, vindictive individual whose behavior was unreasonable, belligerent, arrogant, contrary and unpleasant. As in the case of the Attorney General, Robert H. Gay, the Court found that Kannisto's comments were directed against one under whose direction he worked in close daily contact. Therefore, the questions of discipline and harmony are clearly presented. His comments were presumed to have a substantial disruptive influence on the regular operations of the department. The Ninth Circuit stated in *Kannisto*:

> "Finally, it is clear to us that Kannisto exercised his asserted First Amendment rights, not as a member of the general public, as in Pickering, 391 U.S. 572, 99 Sup. Ct. 1731, but as an officer of the department. In this respect his rights are simply not the same as those asserted in Pickering. See Phillips, supra, 491 F. 2d 955.

> "For the reason expressed, we conclude that the department has not unconstitutionally applied its regulations to protected conduct."

The Supreme Court for the State of Tennessee decided on virtually the same basis as set forth in *Kannisto* that the statements of the Petitioner to the District Attorney General were sufficient to support the action of the Board in finding that the Petitioner was guilty of violating the mandate against using insolent or insulting language to any citizen, which amounted to conduct unbecoming an officer that would impair the performance of his duties.

The fact that in this case the District Attorney General complained to the Chief of Police of the City of Columbia is evidence that the Petitioner's work with that official would be impaired.

In both the *Kannisto* and *Pickering* cases, the courts held that it was important to determine whether or not the statements made by the employee would impede the proper performance of the employee in his daily duties. In this particular case the Supreme Court for the State of Tennessee found that it would.

In *McQuillin, Municipal Corporations*, Vol. 4, 3rd Rev. Ed., §12.240 (1979), p. 282 it gives a good summary of the law in regard to statements of public employees:

> "A municipal employee has an absolute obligation to perform satisfactorily the duties and work in his position. He may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business, the privilege of governmental employment may be withdrawn without it being said that he was denied freedom of speech. To hold otherwise would enable governmental employees to practice the rankest

> form of insubordination and safely hide behind the right of free speech. Gasparinetti v. Kerr, 568 F. 2d 311 (CA 3rd)."

In regard to the Grand Jury issue in this case, the Petitioner conceded that he failed to prepare a file on his investigation and to consult his superiors as directed by the Chief of Police. The Supreme Court for the State of Tennessee held, and we think correctly so,

> ". . . We do not think that the plaintiff's right to appear before a grand jury necessarily insulates him from discipline as a result of this failure." Sup. Ct. Op. Appendix "A", p. 18)

Respondent feels that it is important to point out the fact that Ernie Anglin, who was the object of this investigation, was not a member of the Columbia Police Department nor an official of the City of Columbia, Tennessee, in any respect. Although it has been alleged that he was a friend of the Mayor's, there is no proof in the record to support these allegations.

As was pointed out to each and every Court that has ruled upon the facts in this case, the Petitioner violated all of the orders issued to him by his superiors and has sought to avoid dismissal for the disobeyance of these orders simply because he appeared in front of the Grand Jury prior to his dismissal.

The reasons for the Petitioner's discharge were not his appearance in front of the Grand Jury, but his total failure to obey the orders given to him in writing by his superiors and his insulting remarks to the Attorney General during the heated discussion in the Attorney General's office.

CONCLUSION

For the reasons given above, your Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX "A" - (OPINION OF THE COURT OF APPEALS, MIDDLE SECTION, NASHVILLE, TENNESSEE)

(Filed June 29, 1979)

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

MAURY LAW

FRANK WATTS
Plaintiff-Appellant

VS.

CIVIL SERVICE BOARD FOR
CITY OF COLUMBIA, TENN.
Defendant-Appellee

APPEAL FROM CIRCUIT COURT, MAURY COUNTY, TENNESSEE
THE HONORABLE JOE M. INGRAM, JUDGE

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Attorney for Defendant-Appellee

HENRY F. TODD
Judge

AFFIRMED

OPINION

The plaintiff, Frank Watts, has appealed from the judgment of the Trial Judge affirming the action of the Civil Service Board of the city of Columbia in suspending plaintiff from the Columbia Police Department indefinitely.

On April 25, 1977, plaintiff-appellant, Frank Watts, a member of the Columbia Police Department was suspended indefinitely for

> "disobeying a written directive of the Chief of Police and conduct unbecoming an officer, both violations of the Standard Operating Procedure Manual of the Columbia Police Department."

The cause was removed to the Circuit Court by certiorari, where the Trial Judge, sitting without a jury, entered a judgment by which the action of the Civil Service Commission was "sustained". On appeal to this Court plaintiff's brief summarizes the six assignments of error in the following issues:

> "I. Did the action of the policeman in engaging in a heated discussion with the Attorney General amount to conduct unbecoming an officer?
>
> II. May a Chief of Police lawfully order a policeman not to go before a Grand Jury to seek an indictment?
>
> III. Was the action of the majority of the Civil Service Board illegal, arbitrary or capricious or did it exceed its jurisdiction?"

Pertinent material facts are as follows:

On June 4, 1976, as a result of testimony of plaintiff, the Maury County Grand Jury returned an indictment

charging one Ernie Anglin with the offense of concealing stolen property.

When the accused appeared for trial in January, 1977, the prosecuting attorney was of opinion that the indictment was defective, and he was permitted to enter a nolle prosequi with the stated intention of seeking another indictment against the accused.

On February 21, 1977, plaintiff received a letter from the Chief of Police stating:

"Dear Officer Watts:

On February 16, 1977 this office was advised by District Attorney General Bob Gay that you presented a case against a Mr. Ernie Anglin, and it was dismissed in Circuit Court by Judge Sam Lewis on January 17, 1977. General Gay stated that you consulted with him at his Lawrenceburg office on February 10, 1977 at 8:45 a.m. at which time General Gay informed you that this case would not be represented to the Maury County Grand Jury due to an inadequate case.

I was further advised that your attitude in his office on this matter was conduct unbecoming an officer. It was also mentioned that you attempted to pursue this matter as a civilian, which you cannot do, based on the facts you have already testified to information you obtained as a police officer.

You appeared before the Grand Jury and prosecuted this case in January, 1977 representing yourself as a Columbia Police officer. You were not under any direction or supervision to act as a police officer representing the Columbia Police Department in this case. This is to advise you that you shall not proceed with any evidence to the next Grand Jury or any other

court, news media, or any other persons concerning this case unless you have prior clearance from either me or the City Manager. Your conduct representing yourself to the Grand Jury as an authorized representative of the Columbia Police Department is subject to further review.

You have been given previous reprimands regarding policies and procedures of this department without going through the official channels. Your conduct and investigation into this matter without approval of the proper authorities is in defiance of previous reprimands, and you will be notified of the specific disciplinary measures to be taken.

Sincerely yours,

/s/ Edward L. Holton
Edward L. Holton
Chief of Police

ELH:nc

cc: City Manager
Employee's file
Civil Service files

APPROVED: /s/ Barrett H. Jones
Barrett H. Jones, City Manager"

Thereafter, plaintiff showed the letter to two members of the judiciary.

On March 9, 1977, plaintiff addressed the following letter to the City Manager:

"Mr. Jones:

I Frank Watts request permission to go before the Grand Jury that is now in session with the same evidence that I had when I went before them in June of 1976, and got an indictment against Mr. Ernie Anglin.

The case was dismissed by request of the District Attorney General's office, do (sic) to the fact that they made an error in the indictment.

I have no further evidence in this case. I need an answer right away.

Thank you

Officer Frank Watts
Columbia Police Dept."

On March 10, 1977, the Chief of Police wrote plaintiff as follows:

"Dear Officer Watts:

This letter is in answer to your request of March 9, 1977 to appear before the Grand Jury on an Ernie Anglin case. You stated in your request that you had no additional information and only wanted to return to the Grand Jury because the previous trial was dismissed due to an error.

It is the opinion of this office that since no record or case number was ever entered into the files with the Columbia Police Department on this case that your request be denied. If this is to be pursued and you would share your information and evidence with our Detective Division which handles our investigative matters on criminal problems, and if upon their investigation with your aid and evidence found probable cause to prosecute this case, this department would certainly grant you permission to do so.

After conferring with the Attorney General, it was his opinion that there was evidence lacking in this case. It was stated in your previous reprimand that you did not have a case against Mr. Ernie Anglin, and

therefore, your permission to pursue this case is denied. Your letter of reprimand concerning this matter dated February 21, 1977 still stands.

Sincerely,

/s/ Edward L. Holton
Edward L. Holton
Chief of Police

ELH;nc

APPROVED: /s/ Barrett H. Jones
Barrett H. Jones, City Manager

Thereafter, without further consultation with any City or Police official, plaintiff appeared before the Maury County Grand Jury without being subpoenaed and testified in support of the re-indictment of Anglin on the charge of possessing stolen property. At this time he was asked whether he had discussed the case with city detectives, and he answered in the negative.

The Grand Jury did not indict Anglin.

Thereafter, plaintiff had a discussion of the matter with the Attorney General which became "heated" and in which plaintiff said, "No two-bit politician is going to keep me from presenting a case to the grand jury."

At no time did plaintiff report to his superiors that he was investigating the Anglin matter or that he would testify to the Grand Jury on the subject. The Columbia Police Department has no record of plaintiff's activities, findings or actions in regard to Anglin, except as recorded in the previously quoted correspondence.

The Columbia Police Department Manual, a copy of which had been given to plaintiff, includes the following test:

"All lawful orders of superior officers shall be cheerfully, faithfully and promptly obeyed and enforced without question or argument. If any officer does not clearly understand an order, he shall ask for such information as may be necessary for a clear understanding but under no circumstances shall he question the authority of a superior officer or engage in any argument concerning the order given."

. . . .

"Members shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentatively and respectfully and shall exercise patience and discretion in the performance of their duties. At no time shall they use coarse, profane or insultant (sic) language to any citizen or shall they speak disparingly (sic) of any nationality, race, creed, religion or political belief."

Plaintiff relies upon testimony of the two members of the judiciary who were consulted by him and who testified to their opinion of the right of any individual to appear and testify to a grand jury on any matter. It is exceedingly regrettable that plaintiff saw fit to draw these two excellent judges into this controversy. The testimony elicited from them is not considered material to the issues upon which the appeal will be decided by this Court.

The issues before this Court are:

1. Whether a city police department may properly require its officers to pursue investigations and prosecutions consistent with the prescribed channels, communications and record keeping policies of the department, and

2. Whether the conduct of the plaintiff in disregarding such requirements and/or in his conference with

the Attorney General were such as to justify the action taken by the Commssion.

3. Whether the action of the Civil Service Board was illegal, arbitrary or capricious, or in excess of its jurisdiction.

Issue No. 1, above, does not involve the unlimited right of a citizen to communicate with the Grand Jury. This is so because no issue is made of plaintiff's right to go before the Grand Jury *as an individual.*

The problem arises from the fact that plaintiff was a sworn law enforcement official, a member of a municipally sponsored, supported and controlled police agency. This being true, all of the law enforcement actions of plaintiff were presumptively committed in the course of his employment with the City; and the City sustained an exposure to liability for such actions. Indeed, the City has been sued by Anglin for the actions of plaintiff.

If the City is to be liable for the actions of its employee, then the City is entitled to have such control of the actions of the employee for which it might be liable, the actions which are presumptively or actually committed within the scope of plaintiff's employment.

If plaintiff had seen fit to obey instructions by sharing information with designated police officials and if such officials had deemed plaintiff's information to be insufficient for prosecution, then the proper official of the police department would have had the authority to forbid plaintiff to prosecute *in his capacity as a policeman.* In this event, plaintiff would retain his right *as an individual* to appear before the Grand Jury; and the police department would have a right to disavow any authorization for or connection with the prosecution in order to assure that civil liability for the prosecution rested solely upon plain-

tiff as an individual, and not upon the City for official acts of one of its policemen. Also, the Grand Jury, in its discretion, had the power to weigh the disapproval of police officials against the charges brought by plaintiff as an individual.

Plaintiff's brief concedes that this action is governed by T.C.A. §27-914 which limits the review of municipal civil service actions to common law certiorari.

In such actions the reviewing court is limited to inquiry as to whether the administrative agency acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Company v. Railroad and Public Utilities Commission,* 195 Tenn. 593, 261 S.W.2d 233 (1953).

Under the common law writ of certiorari, questions of law only will be reviewed by the courts. An action of an administrative agency which is not supported by any evidence is arbitrary and void and may be quashed on common law writ of certiorari. Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency. Any additional evidence offered to the reviewing court is limited to the question of whether the agency exceeded its jurisdiction or acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Co., Inc. v. Railroad & Public Utilities Commission,* 195 Tenn. 593, 261 S.W.2d 233 (1953). *People's Bank of Van Leer v. Bryan,* 55 Tenn. App. 166, 397 S.W.2d 401, *Bayside Warehouse Co. v. Memphis,* 63 Tenn. App. 268, 470 S.W.2d 275, *Brown v. Tenn. Real Estate Comm.,* Tenn. App. 1972, 494 S.W.2d 506, Cert. den. 414 U.S. 877, 38 L ed 2d 122, 94 Sup. Ct. 54.

In view of the discussion (above) of the rights of a City to control the official acts of its policemen, and the

admitted disregard of the instructions of the Chief of Police, quoted above, this Court concludes that the Commission was acting upon substantial evidence and proper, legal and constitutional grounds in finding plaintiff guilty of misconduct meriting discipline.

In respect to the conversation with the Attorney General, this Court has concluded that there is substantial material evidence to support the finding that plaintiff was guilty of violating the police regulation against "course, profane or insultant (insulting) language." The constitutional right of free speech allows the reasonable expression of opinions, but does not prevent a police department from limiting the manner of expression by its members. The use of such a derogatory remark to and about a high public official charged with a constant working relationship with the police department and in such a loud voice as to be heard by others outside the building can hardly be characterized as a compliance with the quoted regulation.

The foregoing disposes of the first two issues proposed by appellant.

In regard to the third issue, the only argument offered by appellant is as follows:

> "Board member Moore was belligerent throughout the hearing and made *all* the motions to exclude evidence offered by Appellant. He even made the adjournment motion. He told Appellant's counsel that he was trying to confuse the issue and attempted to tell counsel the course he would follow during the hearing. He acted the prosecutor throughout the entire hearing.
>
> Previous to the official Board meeting, the Board met to discuss a date for the setting of the hearing,

at which meeting in public and in front of the news media made the statement, 'I see that our friend Watts and his nutty lawyer are coming up again.'

Board member Moore not only was belligerent and unfair in his actions while sitting as a member of the Board, but did not give a fair and impartial hearing, he having previously made up his mind that Appellant was guilty and had a nutty lawyer. Appellant, therefore, further says, that since the vote was 3 to 2 and since the other two members of the prevailing side invariably voted the same way as did Board member Moore, that he illegally, arbitrarily, and capriciously influenced the other members of the Board and that had he, the Appellant, been given a fair hearing by an impartial Board, the results would have been different. In other words, if Board member Moore had not previously made up his mind the vote could just as easily have been 3 to 2 for retaining Appellant on the Police Department, or 5 to 0."

It will be noted that the argument contains no citations to the record to support any of its factual allegations. Appellant's "Statement of the Case" contains the following factual statement relating to the present issue:

"Mr. Moore, a member of the Board, made the statement, "I see our friend Watts and his nutty lawyer are coming before us again"; Mr. Moore subsequently sat as a member of the Board on the Watts case; Mr. Moore spoke out in a strong voice at all replies he had at the hearing. (B.E. pp. 23-25)"

The only supporting testimony found in the cited portion of the bill of exceptions is as follows:

"A. He said, "I see our friend Watts and his nutty lawyer are coming before us again."

. . . .

A. Well, in a majority of objections or whatever the replies that he had to the offense, there was a strong tone of voice. In other words, he wasn't quiet about his talking. In other words, he was heard throughout the meeting room quite clearly."

Appellant also states in his brief:

"Mr. Moore made the majority of the motions to disallow the evidence and objected to what was to be submitted to the hearing. (B.E. p. 28)"

The testimony cited is as follows:

"Q. Is it your understanding that Mr. Brown was the Chairman?

A. Yes.

Q. Now, who was the one who made the majority of the motions on disallowing our evidence?

A. In other words, who objected to what was to be submitted to the hearing?

Q. Yes.

A. Mr. Moore."

Appellant also stated in his brief:

"Eugene R. Moore, one of the members of the Board, denied he made the statement attributed to him; he said his statement was "here comes our friend Watts and his lawyer again"; he testified that he thought someone else was his attorney; that he did not know "this man" was going to be his attorney. (B.E. p. 36)"

Appellant's admission obviates the recitation of admitted testimony.

Appellant also states in his brief:

"Mr. Watts had been before the Board on another matter, but not to face charges. (B.E. p. 40)

He was angry "at this man (Mr. Fleming) because of the fact that he and this attorney here sometime got together and wanted to do away with the first charge, you see." (B.E. p. 42)"

The cited pages contain the testimony of Mr. Moore as follows:

"Q. Now what do you mean when you say here comes Watts again?

A. Because, you see, here a year or two ago he also came against the Civil Service Board for the procedure that the Board and the City had taken in regard to the appointment of the Assistant Police Chief. You see, we were up here before you see and that's why I made the statement.

. . . .

Q. Now, one of the very first objections that was made, and I believe that you brought this up, or you can correct me if I'm wrong on that, had to do with certain things that I wanted to ask certain people about and you accused me of trying to confuse the issues and successfully for a good while stopped me from going into certain things, do you recall that?

A. Yes, I do.

Q. And you were later overruled by Mr. Fleming I believe, were you not? Mr. Fleming suggested—

MR. FLEMING: Your Honor—

THE WITNESS: No, I wasn't. I'll tell you why, he didn't have nothing to do with it. In fact, I was mad at him after this thing was over.

. . . .

(By Mr. Fleming)

Q. Mr. Moore, I believe you did state something there might be of interest to the Court. Would you repeat your feelings toward me after the hearing?

A. Yes. I was angry at this man because the fact that he and this attorney here sometime got together and wanted to do away with the first charge, you see. Now if there was some reason that that first charge wasn't proper, then this should have been determined long before the charge was ever made and that has to do with whether an individual can take it to the Grand Jury without permission from an employer. If that's the way the Court will rule, you see, these things should have been known and this man should never have been charged with that.

. . . .

(By the Court)

Q. Mr. Moore, on what grounds did you find Mr. Watts should be suspended?

A. Well the fact that, the fact that he had been given the notice to bring his evidence to the City Police which he hadn't done before, to the detectives and let them determine from their investigation whether this case should be brought to the Grand Jury again, but he did not do that. He disobeyed his superiors. I've been an employer in some way ever since 1947 and especially with the City, you've got to

have a certain amount of discipline within an organization, otherwise you don't have anything you see. You have havoc and you can not have a—.

Q. In other words, you actually found him guilty of not obeying a superior officer then maybe?

A. Right.

Q. Or not cooperating with a superior officer?

A. Right.

Q. Is that the only charge you found him guilty of?

A. Well then of course the testimony on the second charge from Mr. Gay of course was quite evident that he was also guilty of the conduct unbecoming an officer because of his conduct down at Mr. Gay's office."

The foregoing are all of the material allegations of appellant's brief and all of the support therefor in the bill of exceptions.

The Trial Judge, sitting without a jury, found adversely to appellant as to these allegations. In part, the finding was based upon judgment as to credibility of witnesses and otherwise upon the preponderance of the evidence. The finding of a trial judge on an issue which hinges on the credibility of a witness will not be reversed on appeal unless, other than oral testimony of witnesses, there is found clear, concrete and convincing evidence to the contrary. *Tenn. Valley Kaolin Corp. v. Perry,* Tenn. App. 1975, 526 S.W.2d 488. No such grounds for reversal are found in this record.

Non-jury judgments are presumed correct unless the evidence preponderates otherwise. T.C.A. §27-303. The evidence does not preponderate otherwise.

Accordingly, the finding of the Trial Judge as to the third issue, above, will not be disturbed.

All of the complaints of the appellant have been examined and have been found insufficient to require reversal.

The judgment of the Trial Judge is affirmed, that is: the action of the Civil Service Board is affirmed; the petition of plaintiff for certiorari is dismissed; and all costs, including costs of this appeal, are taxed against appellant and his surety.

Affirmed.

/s/ Henry F. Todd
Henry F. Todd, Judge

Shriver, P.J., Concurs
Drowota, J., Concurs